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Estabrook, Henry Dodge

The law merchant vs. the
law of politicians

New York

1915

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THE LAW MERCHANT
VS.
THE LAW OF POLITICIANS

A Diagnosis of the Case of
American Business

By
HENRY DODGE ESTABROOK, Esq.
Member of the New York Bar

The Market World
New York City
1915

Ms. 31, 1916-1918

FOREWORD.

Henry Dodge Estabrook, Esq., the author of the following paper, when called in, both by The Lawyers Club, of New York City, and also by The Commercial Club of Chicago, to diagnose and prescribe for the unhappy case of business in the United States, stated at the outset that he knew "very little about business and nothing whatever about medicine," but that his justification for acting in the desired capacity must be that "in this era of abstract reasoning, mere unacquaintance with a subject is no disqualification for discussing it or even dogmatizing concerning it." It is needless to say that Mr. Estabrook's would-be patients, the puzzled and discouraged lawyers and business men of New York and Chicago, were far from taking the same view of his attainments and skill which he took. Indeed, for quite twenty-five years past those who have had an opportunity to observe the sureness of his diagnostic powers, both in the field of law and in that of political and public affairs, those who have been familiar with the keen play of his mind and with his command of great stores of experience and reflection, and those who have listened to his vivid, witty and sagacious eloquence,—all these have known that Mr. Estabrook possesses to a singular degree one of the most precious of gifts, that of going straight to the heart of a matter. There has been no divergence of opinion on this point among all who have come in contact with him during his busy life, whether in the earlier years he spent at Omaha, Nebraska; or in those subsequent ones, when his activities centred at Chicago, and when his reputation became national through the assistance he rendered with mind and tongue in the McKinley campaign; or during the last decade, in New York City, where his wisdom as a counsellor of men has found its fullest opportunity. To know men and things,—particularly American men and American things,—broadly and penetratively, yet sympathetically and with the added grace of humor, has been the achievement, always rare, which gives recognized weight to Mr. Estabrook's opinions and begets confidence in his judgments on the part of those who are themselves esteemed as experts.

In the accompanying study of the situation of American business at the present time Mr. Estabrook lays a sure finger upon a generally unperceived yet fundamental cause of the "weary, flat, stale and unprofitable" condition of our industry and trade. With a vivacity of expression appropriate to the occasions when he set forth his views, yet with unerring indication of the spot about which the malady gathers, he makes it clear that both our political leaders and the public at large have allowed to become obscure the very conception of the function of business, of the necessary conditions of the efficient

conduct of business, and of the proper relation of the community and of government to business men, or "merchants," to use their older designation. The loss of a distinct and general understanding of what is meant by the Law Merchant is shown by Mr. Estabrook to be significant of an unhappy change in common thinking, which has resulted in attempts at legislative definition and determination, whose consequences have been confusion, uncertainty, loss of energy and initiative, among "merchants," or business men. Yet the prosperity of the country, its continued progress in constructive achievement, the increase of the welfare of its population as a whole, are all dependent in the last resort upon the courage, the freedom from unnecessary checks and uncertainties, the continuous creative enterprise of these same "merchants," or business men. When for any reason they pause in their larger endeavors and refrain from giving their minds free scope in new undertakings, everything slackens and every rank of society is dismayed at the diminution of its prosperity and contentment. It is Mr. Estabrook's idea that the first step necessary towards restoring the confidence and constructive activity of the "merchants," or business men of the country, is to revitalize the nearly forgotten traditional conception of the place and function of business men and the old belief in the substantial justice of their Law Merchant. Assuredly, this is a fruitful idea, worthy of the interest of every thinking American business man and of every patriotic American in any walk of life. We commend it to the attention and reflection of the reader.

THE EDITORS,
The Market World.

THE LAW MERCHANT VS. THE LAW OF POLITICIANS

By Henry Dodge Estabrook, Esq.

A FEW weeks ago, the members of the Commercial Club of Chicago were sitting in supposed safety and comfort behind their trenchers, when their president, Bernard E. Sunny, saluted them with these rapid-fire sentences: "Many good people who do not pretend to understand national economics are mystified at the vast amount of want, idleness and actual starvation all over this country of ours, where peace reigns, where crops have been abundant, and where for years there has been sufficient for the worthy and industrious. They ask, 'Why have the mills shut down, or partly so?' 'Why has the erection of new buildings stopped, or mostly so?' 'Why have the railroads ceased building extensions and improvements?' 'Why are interest payments defaulted and dividends reduced in many cases?'"

If there are any somnolent members of the Commercial Club of Chicago the detonation of this discharge must have aroused them to a realization of the truth of the saying, "When at peace, prepare for war." As for myself, I needed no arousing, because some time before I had received from Mr. Sunny, under the guise of an invitation to speak in answer to some of his questions, a volley of long-range letters, seven or eight in a bunch, fired from a Gatling typewriter like so much shrapnel. I was there in token of surrender. Besides I had wanted to surrender. I had wanted a whole day in Chicago, just to visit as many old friends as I could find at leisure. It transpired that everybody seemed at leisure in Chicago—ample leisure—leisure to burn—thousands with leisure to sell at any price and no takers—thousands bustling about, if only to keep from yawning. Like the rest of the country, and as a slight variation of boredom, Chicago would welcome a friend or even an enemy—anything to save it from what some one has called "a state of mind," or perhaps, like the poet, you would call it "the malady of thought."

Now, when business in the United States, and especially in Chicago, has become a yawn, or mere bustle instead of hustle, something ails the body politic. It is more than "a state of mind," a certain brain specialist to the contrary notwithstanding; and we should lose no time in summoning a doctor. And that had been the upshot of Mr. Sunny's letters to me—he had wanted me to come and prescribe, and I was there on the job. To be sure, I know very little about business and

nothing whatever about medicine; but in this era of abstract reasoning, I take it, mere unacquaintance with a subject is no disqualification for discussing it or even dogmatizing concerning it; though I have a presentiment, founded perhaps on a hope, that this metaphysical era is passing, together with those who have put the "sigh" in sighology.

I accepted for the nonce the rôle of doctor assigned me by Mr. Sunny, because our ailment seemed easy to diagnose, and the remedy—well, it is a household remedy and has always given immediate relief. We are suffering, I said to myself, from what the books call "amnesia," or loss of memory, complicated with a touch of "neurasthenia," commonly known as the "willies," and to fetch us out of the kinks requires, first of all, a reminder—a good old-fashioned dose of history, familiar history, ever-recurring history. As a Republican of Plutonian blackness, I believed that it was only necessary to place our Government once more in the control of Republicans—black Republicans like Blaine, who said that "protection is the policy of enlightened selfishness"—Republicans, therefore, enlightened enough and selfish enough to believe in America before Senegambia or China—to believe in America before all the world—America "über alles," so to speak.

But having gotten thus far in my diagnosis and prescription, I suddenly paused. For it occurred to me that it is not the Democrats alone who are responsible for the atrophy that has come upon us. Was McKinley the last of the Mohicans? Are we never to see his like again? We elected McKinley under circumstances of national distress in many respects identical with the circumstances of to-day—business paralyzed—mills closed—soup houses open and in full blast. Then the complaint was that the purchasing value of the standard dollar was too great—another way of saying that the cost of living was too low; that plutocracy was crucifying labor on a cross of gold; but that prices would boom, our debts would somehow liquidate themselves and everybody would become prosperous and happy by the simple expedient of giving to fifty cents' worth of silver the magic name of "dollar." It was the wickedest flimflam, the most impudent allurements, ever held out to an honest man. And yet so specious was the argument and so desperate were the conditions that McKinley was elected only by a squeak; twenty thousand votes properly distributed would have elected his opponent. The ensuing four years of McKinley's administration totally discredited every theory, prophecy and argument of that opponent, proving him to be as shallow as a soup plate. A man of sensibility would have been crushed by the demonstration, or would at least have taken on a becoming modesty. Not so Mr. Bryan. But Mr. Bryan himself is hardly responsible for our present predicament. He has been pigeon-holed in a cabinet where it would take a card index to locate him.

The condition of the country was so gratifying during McKinley's

first administration that he was re-elected with only the opposition of Mr. Bryan aforesaid. He had scarcely entered upon his second term when he was stricken down by the treacherous hand he was about to clasp in kindness and goodwill.

The Vice-President who in consequence of this tragedy was called upon to fill out Mr. McKinley's second term forthwith pledged himself to carry out McKinley's policies for the remainder of that term. It was his first promise concerning the presidency, and he kept it like a man—so much so, and the country was so altogether satisfied with the results, that Mr. Roosevelt was elected to succeed himself, without even the opposition of Mr. Bryan aforesaid—at least I have heard Judge Parker intimate something to this effect.

There was little in Mr. Roosevelt's behavior during the first four years in his great office to indicate that he would run amuck during the next four years. Even in retrospect I can truthfully say that I think him always to have been more radical in speech than in action. His bark was really worse than his bite. I said as much one day to a friend of mine, who was railing at him in good set terms. He replied that my distinction reminded him of the man who went to call on his neighbor and was confronted in the pathway by his neighbor's watchdog. "Don't be afraid of the dog," shouted the owner from the veranda; "he won't hurt you. Don't you see him wagging his tail?" "Sure I do," yelled the visitor, "but I also hear him growling, and hang me if I know which end to believe!"

But just the same my differentiation holds good. Some of the things done by Mr. Roosevelt needed to be done, and in robust fashion. I for one tried hard to forgive the violence of his words and manner for the sake of the putative motive back of them. I began by admiring him because, if the paradox may be pardoned, he seemed so profanely in love with righteousness; because he wanted peace and was just aching to fight for it; because he was such an ungentelemanly gentleman and such a damned good Christian! But as Mark Twain said of Napoleon, Mr. Roosevelt attempted to do too much and—did it! He mistook the genuine sober conservatism of the American people. They will not consent to live forever in a riot or in a frenzy of gabble. They want to do business, and sooner or later they are going to do it!

William Howard Taft, who followed, is and always has been bigger than his reputation. But his position was designedly made difficult and equivocal from the very beginning, and he wasn't quite big enough to rise above it. He was the victim of a hue and cry for a reduction of tariffs—horizontally—arbitrarily—any old way. His appeals to the country to go slow in a matter of such consequence—to await the creation of a Tariff Board, when the whole subject could be considered deliberately and scientifically—were drowned in catcalls. There is nothing so unreasonable as a contagion. You might as well

argue with the measles. Even his unfailing good nature and ambient smile were handicaps, for the average voter wants his statesman as solemn as cholera morbus. The quaint humor of Lincoln and the slapstick roistering of Roosevelt were exceptions to the rule; but it required their peculiar genius to carry it off. Then Mr. Taft began to wield the Sherman Act like a battle-axe. Perhaps he thought it was his duty. Perhaps he thought it was popular. Perhaps he was egged on by his legal advisers. And perhaps after all it was the best thing for the country that could have happened, for the outcome has demonstrated the illegitimacy of all such laws and the futility of their execution. We call *sabotage* a crime. It is malingering raised to a principle. And yet many of our trust laws are a sort of *sabotage* imposed by statute. We preach efficiency and legislate against it. Give Nature a chance! You really cannot repeal her laws nor legislate God out of His universe!

But in spite of some reasons for voting against him, I voted for Mr. Taft for a second term; you will recall that he did get several votes—one of them was mine.

As for President Wilson, who marched into office over a *pons asinorum* built by his opponents, he entered upon his duties with a popular feeling for him made up of curiosity and respect. He was the only schoolmaster who had ever stepped from a classroom over a State Capital and into the White House. Curiosity was justified. So was respect, for his mental strength was conceded, and no one doubted his loyalty for purpose. Thousands of Republicans had voted for him for one reason or another—principally one—and wished him well. To be sure, no Republican reared in the school of Hamilton could regard hopefully a program that challenged every article of his faith. But he could at least be tolerant and even admit to himself that possibly Mr. Wilson knew more than Hamilton. He was willing to be shown. He was from Missouri. His attitude was one of watchful waiting.

I should be the last to deny the high competence of President Wilson in the fields he has made his own by long study and reflection. He has been an observer and recorder of great movements of human affairs; he has pondered well the course of history and the character and purposes of those who made it; he has deeply sympathized with the larger and nobler aspirations of mankind. When he speaks of these things, he speaks as a master; and he has shown that he will conform his actions to the ideals which he has derived from his scholarship. But Mr. Wilson himself disclaims any practical knowledge whatever of business. You would say offhand that this fact made it a moral duty and an obvious necessity that in his capacity as President of the United States he should call to his aid men better informed and wiser than himself with regard to this basic interest of the country, and that he should solicit their instruction and weigh carefully their suggestions. I am credibly informed that Mr. Wilson

has virtually dispensed with submitting his policies about business to cabinet meetings,—though really, when you come to think of it, he may have been justified in so doing. But the trouble is that a man, however great his ability and however high his motives, who undertakes in impartial aloofness to make rules to govern facts with which he is himself unfamiliar, runs the risk of producing mere arabesques of hypothesis, instead of workable principles whose correctness and substantiality are apparent to all.

Perhaps these recent chapters in our political history are intercalary, designed to make us appreciate the more highly what came before and to anticipate the more eagerly what is ahead. At any rate this must be the hope of every benighted, unregenerate Republican like myself, who believes that the natural state of this country is to be busy, prosperous and contented. But these chapters do not, as they stand, warrant the prescription of the aforesaid household remedy for our present run-down, political hook-worm infested condition, namely, that we should merely return the Government to good Republican hands and let it go at that, confident that our restoration to health will immediately follow.

Yet I have frequently tried to lull myself into thinking that the remedy is sufficient, and I have eased some restless and impatient hours with the simulated enjoyment of being a citizen unvexed by a government which aims at the application of transcendental mathematics to its and my affairs, instead of being contented with arithmetic that everybody can understand. There is the tariff, for example. It is a theory of Mr. Wilson,—and of his party, I may add,—that tariffs should be reduced substantially to a free-trade basis; and under his manipulation this has been done. We still have intact the costly machinery for the collection of imposts; but, as these no longer amount to much, we have had recourse to the differential calculus to supply the deficiency.

I once heard McKinley declare that the difference between those who believe in a tariff for revenue only and those who believe in a tariff for protection had become more academic than real; for if you would give him a tariff that produced the running expenses of this Government it would be all the protection he, as a high protectionist, would ever ask for. I am not going to argue the tariff question at any length, so there is no occasion to be frightened. But consider that statement for a moment. McKinley made it, and he was no dreamer. It takes a billion dollars a year to pay the upkeep of our Government. This money must be raised by some scheme of taxation. Why not, as far as possible, by imposts? Aside from the collateral advantages of this method, which every unconverted Republican must think worthy of some attention—as that it has served not only to raise our revenues but to develop our resources; that all our standards have been adapted to it, prices, wages,

rentals; that it has moulded the very temperament of our people and their ways of living—aside from these advantages, I say, and considering only that not inconsiderable matter, the convenience and comfort of the taxpayer, is there any other known way of raising the revenues required by the Government which is demonstrably superior to this? If a man must have a tooth extracted, I would suggest laughing gas to assuage the anguish of the operation. If I must pay taxes, then a tax that can be extracted from me painlessly, blissfully, without my knowing it and with no disturbance to my serenity and peace of mind, is infallibly the tax I would choose to pay. There's a psychological phenomenon that really commends itself!

But the very simplicity and painlessness of this kind of taxation seems to have made it suspect. It was known, of course, that under existing schedules there would be a tremendous slump in revenues—though the slump has far exceeded the estimate; to compensate for which there has been levied an income tax. My contribution under this levy is not large enough to warp my judgment regarding the tax itself; it consists principally of an annual vertigo and brainstorm induced by an effort to make up my report. How any one less gifted than my law clerk ever succeeds in doing it, God or McAdoo only knows! But I cannot imagine myself so poor that I could ever glorify the tax or reckon its pecuniary benefit to me the equivalent of my humiliation in accepting such a benefit. As an expedient it is clumsy, costly, and inquisitorial. The vast and complicated machinery through which the taxes are gathered into the treasury absorbs much of the tax in the expense of maintenance—like one of these institutional charities that charge you 80 per cent of your donation to get the remaining 20 per cent into the hands of the beneficiary.

These, however, may be called reflections of an unprogressive Republican whose mind has not been able to soar above the plain ideas of traditional Americanism, which are that our Government is founded on the absolute political equality of its citizens—equality of privilege, equality of obligation; that we have hitherto been free from class distinctions created by law and that we ought to keep free from them; that when we tax the privilege of trading with aliens and leave free from taxation trade among our several States and Territories, which is based on equality of cost production, on American standards of compensation, we are best maintaining equality of opportunity among all our citizens; and that in proportion as our Government regards all citizens with an equal eye and fosters their interests with an equal hand, our prosperity and contentment increase, while in proportion as it is vexatious, inquisitorial, tyrannical towards a part of our citizens and flattering, eleemosynary, paternalistic towards the rest, our prosperity and contentment are checked and diminished. When I consider our situation, however, in the more particular light of the political history we have recently been making, I am led to think that

the divagations of our political Isaiahs and Jeremiahs are in no small degree attributable to the blindness of the prophetic eye to simple truths close at hand with regard to what in reality most concerns all of us, the business to which we owe our living.

It is possible that our men of business and affairs, with their Yankee adaptability, their native optimism and buoyancy of disposition, their fertility of invention, might somehow surmount all other difficulties and discouragements if they could ever throw off the incubus of anti-business legislation. This legislation is based on the assumption that the average American business man is a scoundrel—graded in rascality by the amount of goods found on his person—and that it is the pious duty of our virtuous legislators to protect the rest of us from his machinations. And so we are fly-blown with laws deemed necessary to safeguard a new freedom that cannot be distinguished from an old thralldom. No man to-day can do business and be legally honest if he tries; and if he is only morally honest he is headed for the lockup. President Wilson not only sees no evil in the Sherman Act, but he has done all that a political dentist could do to add teeth to its insatiable jaws.

It is concerning this phase of the business situation (which is, of course, representative of the entire economic situation of the country) that I find myself inclined to ask a few questions. Americans, to whom these questions are addressed, may answer them to suit themselves.

Now, laying out of consideration all matters of police; all laws creating—or perhaps now-a-days I should say, recognizing—class distinctions among our citizens; all the paternalistic efforts of government to help the indigent, the ignorant, the improvident, the incompetent—in many respects commendable and of more or less promise; laying out of consideration all such matters as I have been discussing, there remains the paramount, overshadowing fact that the Law Merchant, as known to us for more than two hundred years, has been stood on its head, and that the merchant in *propria persona* finds himself pretty much in the same attitude. And in this attitude, so favorable for rumination, he has been doing some tall thinking and is bound to put to his fellow-citizens a few pertinent and possibly impertinent interrogatories.

I use the word "Merchant," of course, in its comprehensive and common-law sense, typified by the words "commerce" and "business." I have tried to induce in myself the merchant's frame of mind, without sharing his topsy-turvy outlook, or his rush of blood to the head; and I wish to ask you in all candor:

Has there ever been any pecuniary failure, misadventure or disappointment in your own business career, which, on analysis, you cannot trace to some shortcoming in yourself, either moral, mental or temperamental? If so be, can you point out to yourself, or to others, just wherein the laws and institutions of your country were at fault? If

you can, have such laws at any time, or from time to time, been remedied to your satisfaction?

Do you think that the Law Merchant, as now ossified and straight-jacketed in codes and statutes, is so superior to the elasticity of the Common Law to meet individual cases that you know henceforth just what you and all others may legally do or not do, and that your handicaps to success have been lowered or altogether removed?

You know, or possibly some of you do not know, just what the Common Law is, and how the Law Merchant was gradually developed according to its principles. Permit me to explain this briefly—by letting others talk. Here is what Mr. Justice Holmes has said in his lectures on the Common Law:

"The life of the law has not been logic; it has been experience."

And again he says of it: "Law, being a practical thing, *must* found itself on actual forces,"—such, for example, as the instinct for possession and self-advancement. And he adds: "Philosophy may find a hundred reasons to *justify* the instinct, but it would be totally immaterial if it should *condemn* it and bid us surrender it without a murmur. As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves. If it should do otherwise, it would become a matter for pedagogues,—wholly devoid of reality."

Think of that now! How do you suppose Justice Holmes, away back in 1881, ever conjured up such an awful contingency as making law a matter for pedagogues and so wholly devoid of reality?

But what the Common Law has striven always to do is precisely that—satisfy human instincts in an orderly manner according to the dictates of enlightened reason. Or, as Alexander Pope puts it:

"Those rules of old discovered, not devis'd,
Are Nature's still, but Nature methodis'd:
Nature, like liberty, is but restrain'd
By the same laws which first herself ordained."

Hence Sir Edward Coke was fond of saying that "Reason is the life of the law; nay, the Common Law itself is nothing but reason." And in the old case of *Coggs vs. Bernard* it was said: "Let us consider the reason of the case. For nothing is law that is not reason."

Does not that meet your ideas of what law ought to be? Do you know of any holier sanction—any higher test of the righteousness of conduct—than its reasonableness? If reason abdicates, to what, in God's name, shall reason appeal? When a man is without reason we call him an idiot. Law without reason is tyranny; and a statute that is to be construed otherwise than in the light of reason is an idiot statute and necessarily bad law. Wendell Phillips once declared that "the best use of good laws is to teach men to trample bad laws under their feet." He did not mean, I hope, that the individual was to interpret laws to

suit himself and act on his personal notions of right and justice, for that would lead to anarchy. The function of interpreting law for the guidance of everybody is only for the courts; and this demonstrates at once the necessity *for* courts and the inviolability of their decrees. President Grant said that he knew of no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution. This is probably true in the long run. Certain of our laws, obnoxious to our merchants, are being stringently executed with a vengeance—at great expense and in a deluge of words; but so far this has only served to reveal their absurdity.

Let me further explain that, prior to Lord Mansfield's time, the Law Merchant was a law peculiar to itself. It was created by merchants and administered by them, just as our Stock Exchange has its own rules and its own forms for enforcing them. This Law Merchant was based on the customs of merchants in conducting their business; and these customs in turn grew out of their business experience. It was justice as the merchant saw it; and to his thinking of a higher, finer and more sensitive quality than that known to municipal law. For, as one ancient writer says: "The credit of merchants is so delicate and tender that it must be cared for as the apple of a man's eye." It must be borne in mind that all the earlier commentators on this law were not lawyers, but merchants; for these old merchants had no use for lawyers, except on rare occasions when they found themselves in court and their customs up for judicial investigation. On such occasions the issue was usually one of fact as to the existence or non-existence of a particular custom; and this issue the courts would dump into the jury-box, with varying results.

Now, these old-time merchants had their "guilds," their "trade unions," their "pools," their "gentlemen's agreements," their "combinations in restraint of trade,"—but all within limitations prescribed by their own customs, which customs from long experience they had found to be just and reasonable. For it seems to be a law of nature that antagonistic forces, in their clash and interaction, are bound to achieve some sort of an equilibrium; and this in the case of moral forces we call justice. I find it hard to define justice except as a moral equilibrium.

I noticed by a Washington despatch recently that the Administration complains that it is already overburdened by the "duty of promulgating definitions for all business activities." I should think it might be. But is that a duty of any administration? I suggest that the burden could be lightened somewhat by turning the job of definition over to the courts, where it properly belongs; for in this workaday world, and so long as human instincts are what they are, we cannot hope to attain to everybody's ideal of justice,—for everybody has his own ideal,—but only to a pragmatic definition and a working basis. Experience evolves its own definitions; and, as I have shown,

the law is based on experience and not on the categories of logic.

Because of this fact, William Murray, when he came to the bench as Lord Mansfield, said to himself: These merchants of ours are good men—honest, honorable, great men—the best in the kingdom. They have carried our commerce over all the world and have made us famous as a trading nation. They have added to our national riches more than have all our lords and nobles combined. Their laws and customs must be just and reasonable, else they could not have won the friendship of those with whom they deal; nor would they themselves have acquiesced in them so long and with so little friction. If Common Law is only another name for common sense and the perfection of reason, then every custom of these merchants must find its analogue, its warrant, and its protection in the law of the realm. It shall be my mission to articulate this Law Merchant with the body of the law, or to destroy it utterly, if found to conflict with fair and honorable dealing.

Wherefore Justice Mansfield began to consort with merchants, visiting their Guilds, summoning them on special juries, everywhere probing into their business habits, their course of dealing and their reasons for their peculiar customs, which seemed to be common to all nations; with the result that there emerged from the courts a new law maxim: *Lex Mercatoria est lex terrae*—the Law Merchant is the law of the land. That is to say, the Common Law adopted mercantile ethics as the standard of right and justice and the measure of legality. There was the rattling of dry judicial bones, the assaults of scholasticism; but the maxim persisted, and is part of the Common Law to-day. For Mansfield was a rare genius like our own John Marshall, which means that he was gifted with common sense—apparently the most uncommon gift in the bestowal of the Almighty. And this maxim embodied the law of our country when the so-called Sherman Act first came before the Supreme Court of the United States for judicial interpretation. Four of the justices of that Court, among them Justice White, declared that the Act should be interpreted with reference to the Common Law—that is to say, in the light of reason; in which case the facts admitted by the demurrer would not have constituted an unreasonable restraint of trade, and the combination complained of would not have been illegal. Five of the justices declared the Act was intended to metamorphose the Common Law, and must be construed literally, though the heavens fall; and, of course, the majority ruled. This ruling, in my humble opinion and with all deference, was one of the few colossal blunders ever committed by that great tribunal; for, taken literally, the Sherman Act is a blight on enterprise—a manufacturer of crimes without turpitude—a remedy worse than any disease it was supposed to palliate. But the Act, thus interpreted, was seized upon by certain “patriots” and purists, to attack the great business interests of our country; to unscramble eggs—with what culinary effect you are all

familiar. Merchants by the wholesale, fearful of a cataclysm, hastened to plead *nolo contendere* to indictments against them. No merchant dared speak with his enemy in the gate, or obey the scriptural injunction to agree with his adversary quickly, much less deliberately, for fear of being guilty of a conspiracy and branded as an outlaw.

And yet Cicero, long ago, had declared that extreme law is extreme injustice; notwithstanding which truism the Sherman Act, together with the numerous progeny begotten by it—this extreme of law—is still enthroned, and business is still prostrate before it.

But let me ask you:

Do you believe the American merchants of to-day are more wicked by nature than the English merchants honored by Lord Mansfield's confidence?

Do you believe that the *ipse dixit* of a legislature can make a good man bad?

Aren't you tired of statutory crimes?

Does it not grieve you—the patriotic soul of you—to see whole platoons of our merchant princes—men whom we are proud to know and delight to honor—men who have filled the commercial world with the fame of their beneficent achievements—does it not grieve you, I say, to see them filing into the prisoners' dock and pleading guilty to crimes that are not crimes in any other nation on earth—guilty of no act not sanctioned by the Common Law and its rule of reason?

Is not this an indictment of a whole people, which Burke thought to be impossible?

Are these men impeached by the spectacle? Or, rather, does the spectacle not impeach the tyranny of the majority—what Tallyrand and de Tocqueville prophesied would become the besetting evil of our form of government? Oh, we are going to pull out of it, so don't understand me as deprecating our form of government! I admit that republics are wicked. They are as wicked as human nature; but they are also as good as human nature, and Kings and Czars and other Potentates are no better!

Let me read to you what Pomeroy, one of our great American jurists, says about our Law Merchant. Speaking of the Law Merchant as left by Mansfield, he says:

“The legislature has, in the meanwhile, done its part; and, while it has not been slow to supply deficiencies and correct mistakes, it has, hitherto, fortunately abstained from any vexatious interference with arrangements dictated by that best of legislators—Experience.

“The mercantile law of England is, in point of fact, an edifice erected by the merchant, with comparatively little assistance either from the courts or the legislature. The former have, in very many instances, only impressed with a judicial sanction, or deduced proper and reasonable consequences from, those regulations which the experience of the trader, whether borrowing from foreigners or inventing himself, had

already adopted as the most convenient. The latter, wisely reflecting that commercial men are notoriously the best judges of their own interests, has interfered as little as possible with their avocations, has shackled trade with few of those formalities and restrictions, which are mischievous, if only on account of the waste of the time occupied in complying with them. The mercantile law of England is perhaps, of all laws in the world, the most completely the offspring of usage and convenience, the least shackled by legislative regulations. * * * It is, perhaps, in consequence of this that we find such high and peculiar sentiments of commercial honor prevalent among English merchants. * * *

"These and such as these are the reflections which have rendered the author of this work exceedingly averse from any idea of reducing our commercial system into a code, by which the energies of the mercantile community would, he apprehends, be shackled; and of preventing them from operating, as they now most usefully do, upon the law, and working out its improvement, without assistance from the legislature. A criminal code would be of great utility, for the rules of criminal law ought to be not only definite, but inflexible, incapable of extension, save by the supreme power of the State. * * * The codification of the law of real property is not worth seeking for. * * * But the codification of our mercantile law would be a national evil. It would destroy the singular and fortunate plasticity of a system whose rules hitherto have been, and always ought to be, made by the merchant and dictated by his exigencies."

Digest these sentiments of a great American law writer at your leisure—your now ample leisure. Meanwhile, to round out my questions to a conclusion, let me ask:

Would you not like to see some great American, who looms big in public life, stand forth before all the people and shake his fist in their faces, calling them ingrates and growlers, unworthy of their blessings, reaping to-day only what they have sown in ignorance and anger?

Would you not like to see him raise his face to heaven and thank God for the matchless boon of American citizenship, under the Constitution given us by our fathers?

Aren't you tired of muckrakers and "belly-achers"; and of the caterwaul of malcontents, who are forever screeching in our ears the words of Richard II:

"Let's talk of graves, of worms and epitaphs;
Make dust our paper, and with rainy eyes
Write sorrow on the bosom of the earth."

If they would only add the rest of the sentence now, "Let's choose executors and talk of wills," shouldn't we almost forgive them?

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